No. 88-1400

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; LEONARD WILSON, Individually and as District Manager, Chicago Office of the Franchise Tax Board of the State of California; and B. M. Rarang, Individually and as Auditor, Chicago Office of the Franchise Tax Board of the State of California,

Petitioners,

v

IMPERIAL CHEMICAL INDUSTRIES PLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF SUPPLEMENTAL AUTHORITIES ON BEHALF OF RESPONDENT

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INTRODUCTION

This brief submits to the Court the texts of two letters, the first dated June 30, 1989, from Julian Santamaria, Ambassador of Spain, to the Honorable James A. Baker III; the second dated August 23, 1989, in reply from John E. Robson, Acting Secretary, to the Honorable Lorenzo Gonzalez-Alonso, Minister for Economic and Commercial Affairs, Embassy of Spain. These authorities are filed as supplements to the record pursuant to Supreme Court Rule 35.5. These authorities were not available at the time of submission of the Brief for Respondent in this cause. These letters reaffirm the present Administration's support of the previous Administration's foreign commerce policy as expressed in the Joint Appendix (pp. 123-125) and the Department of Justice *amicus curiae* brief filed in the district court, below.

1. Letter From the European Community To The United States Government.

EL EMBAJADOR de ESPAÑA

WASHINGTON

June 30th, 1989

The Honorable
James A. Baker, III
Secretary of State
U.S. Department of State
Washington, D.C. 2520

Dear Sir:

The Member States of the European Community have noted that the United States Supreme Court is shortly to hear an appeal against the judgement of the Seventh Circuit Court of Appeals in Imperial Chemical Industries plc [sic] and Alcan Aluminium Limited v. California Franchise Tax Board.

The EC Member States consider this to be an appropriate opportunity to restate their opposition to the use of worldwide unitary tax by the State of California. They would urge the United States Government to confirm that, like the previous Administration they, too, are opposed to the use of worldwide unitary tax.

The views of the EC Member States on worldwide unitary tax are well known.* They consider that the imposition of this tax is inconsistent with the internationally accepted principles underlying the Tax Treaties and Friendship Treaties that individual Member States have entered into with the United States. Specifically, the use of the tax by the State of California:

* Demarche of the EC Member States submitted to the U.S. Department of State; 19 March, 1980; 30 October, 1981; 29 June, 1982; 1 August, 1983; 23 September, 1983; 20 December, 1984; 8 August, 1985; 30 August, 1985.

i) contradicts the "arm's length" principal of allocating income of multi-national corporations between different national jurisdictions;

ii) may give rise to substantial double taxation;

iii) imposes a severe compliance burden by insisting on the restatement of accounts of different, but affiliated, corporations throughout the world even when they are not doing any business in California—accounts which were originally prepared to meet the specifications of the countries in which these corporations are resident;

iv) has perverse effects on the worldwide strategy of multi-national corporations (since, for example, a cost saving investment made in any country outside the U.S., can increase the tax liability in California, even if the California subsidiary is loss-making);

v) discriminates against companies doing business in California via subsidiaries, rather than through non-affiliated companies.

The EC Member States are strongly opposed to the attempt by California or any other State to impose taxation in income of foreign corporations arising outside the U.S.; to interfere with worldwide investment strategies, and to insist on burdensome compliance requirements on companies located outside the U.S.

EC Member States are aware that California has amended its legislation to allow multi-national companies to elect, on payment of a fee, to be taxed on a "water's edge", rather than worldwide unitary basis. However, since they are opposed to the use of worldwide unitary tax in principle, Member States cannot accept that it is right to insist on a fee as the price for electing to avoid worldwide unitary tax. Moreover, the process of making such an election involves substantial and unreasonable burdensome compliance costs.

The EC Member States, of course, support the case submitted by Imperial Chemical Industries and by Alcan Aluminium in the District Court and the Seventh Circuit

Court of Appeal. They also very much endorse the *amicus* brief submitted by the U.S. in the District Court in ICI and Alcan v. California FTB. The EC Member States are aware that the issue currently before the Supreme Court is the question of the standing of the foreign parent companies to challenge the tax in the Federal courts, rather than the constitutionality of the tax itself. However, they believe the two issues to be inextricably interlinked. The EC Member States consider that worldwide unitary tax imposes an administrative and economic burden on foreign parent corporations and breaches the arm's length standard. Since the U.S. in its double taxation convention adheres to the internationally accepted arm's length principle, application of worldwide unitary tax by separate states of the U.S. prevents the U.S. from speaking with one voice when regulating commercial relations with foreign governments, and in the opinion of EC Member States is unconstitutional. The administrative and economic burden is imposed directly on foreign corporate parents and it is this constitutionally significant burden which creates standing for those foreign parents.

The Member States note and appreciate the U.S. Government's opposition to worldwide unitary tax. Given the importance of the present case before the Supreme Court, the Member States would urge the U.S. Government to reaffirm their commitment to the position taken by the previous Administration.

Sincerely,

/s/ Julian Santamaria

Julian Santamaria
Ambassador of Spain

II. Response From The United States Government To The European Community.

THE SECRETARY OF THE TREASURY

WASHINGTON

August 23, 1989

The Honorable Lorenzo Gonzalez-Alonso
Minister for Economic and Commercial Affairs
Embassy of Spain
2558 Massachusetts Ave., N.W.
Washington, D.C. 20008-2865

Dear Mr. Gonzalez-Alonso:

Thank you for your letter of June 30, 1989, enclosing a copy of the letter of the same date from Ambassador Santamaria (on behalf of the Member States of the European Community) to Secretary of State James A. Baker III.

The issue of unitary taxation remains a serious concern to the Treasury Department and, indeed, to the Administration of President Bush. Although I do not want to comment on any particular matter of pending litigation, such as the case cited in Ambassador Santamaria's letter, I want to assure you of our continuing attention to this issue. We believe that states' use of the worldwide unitary tax method may constitute an impermissible interference in the conduct of the nation's foreign affairs, and further progress is required before Federal concerns on this issue can be put to rest.

Thus, we continue to endorse strongly the position taken by the prior Administration under which President Reagan instructed the Attorney General to ensure that the United States' interests are represented in appropriate controversies and cases. We expect the Federal Government to continue to express its views on this matter when and where it is necessary and appropriate to do so.

Sincerely,

/s/ John E. Robson

John E. Robson
Acting Secretary

CONCLUSION

This Court is prayed to take judicial notice of this recent expression of the foreign commerce policy of the United States Government.

Respectfully submitted,

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October 1989